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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Tracy D Ferren,

10 Plaintiff,

11 v.

12 Westmed Incorporated, et al.,

13 Defendants.
14

No. CV-19-00598-TUC-DCB

ORDER

15 Plaintiff filed this case in the United States District Court for the District of Kansas
16 on July 9, 2019, based on the federal courts' diversity jurisdiction, 28 U.S.C. § 1332, over
17 controversies exceeding \$75,000 between citizens of different states. Plaintiff is a resident
18 of Kansas, and Defendant Westmed Incorporated (Westmed) is incorporated in Arizona,
19 with its principal place of business in Pima County, and Defendant McKinnon, President
20 and Director of Westmed, resides in Colorado.

21 On December 23, 2019, the United States District Court in Kansas found it lacked
22 jurisdiction over the case because the employment grievances arose in Arizona. The Kansas
23 court transferred the case here to this Court. On July 1, 2020, the Plaintiff sought and was
24 granted, without any objection, leave to amend or correct the Complaint to add Arizona
25 law, including a constructive discharge claim under A.R.S. §§ 23-1501 and 1502. The
26 Plaintiff filed the First Amended Complaint (FAC) on November 4, 2020.

27 In the FAC, the Plaintiff, an employee of Westmed, alleges state law claims of
28 unlawful retaliation (demotion and constructive discharge), breach of contract, negligent

1 and fraudulent misrepresentation, and promissory estoppel under Kansas and Arizona law.
 2 The Plaintiff alleges that after he reported to Westmed's board in 2018 that the company
 3 was allegedly violating Food and Drug Administration (FDA) rules and regulation and
 4 state and federal employment laws, the Defendant McKinnon retaliated against him by
 5 demoting him and unilaterally changing the annual compensatory provisions, aka the
 6 Domestic Sales Compensation Program, including reducing his sales territories and
 7 number of sales managers reporting to him. Things got so bad, including his compensation
 8 was reduced below what he had been promised, that he was forced to resign, i.e., he was
 9 constructively discharged, on March 6, 2020. The negligent and fraudulent claims of stock-
 10 option misrepresentations inducing him to leave his prior employment and begin working
 11 for Westmed were allegedly made in 2016.

12 Plaintiff sues Defendant Westmed under the doctrine of *respondeat superior*, which
 13 is based in part "on the ground of public policy that where one of two innocent persons
 14 must suffer from the agent's wrongful act, it is just and reasonable that the principal, who
 15 has put it in the agent's power to commit such wrong, should bear the loss rather than the
 16 innocent third person." *Ohio Farmers Ins. Co. v. Norman*, 594 P.2d 1026, 1028 (Ariz.
 17 App.1979). In Arizona, the doctrine of *respondeat superior* contains two elements that are
 18 essential to subjecting an employer to liability for its employees' actions. The first element
 19 is that an employer-employee relationship must exist. *Lee Moor Contracting Co. v.*
 20 *Blanton*, 65 P.2d 35, 36 (1937). The second element is that the employees' acts for which
 21 liability is sought must have occurred within the scope and course of employment. *Baker*,
 22 197 Ariz. at 540, ¶ 17, 5 P.3d at 254. Defendant McKinnon is subject to individual liability
 23 only "[if] the company has invested [him as a] supervisor with day-to-day control over the
 24 company, including the right to fire, and the supervisor has in fact exercised such control
 25 to harm another." *Higgins v. Assmann Elecs., Inc.*, 173 P.3d 453, 458 (Ariz. App. 2007),
 26 *see e.g., Baron v. HonorHealth*, 2020 WL 5638539, at *4 (Ariz. Ct. App. Sept. 22, 2020)
 27 (affirming dismissal of individually named supervisor where complaint failed to allege
 28 facts to support *Higgins* test for supervisory liability).

1 On November 18, 2020, the Defendants filed a Motion to Dismiss pursuant to Fed.
2 R. Civ. P. 12(b)(6) for failure to state a claim. To survive this motion, the Court looks
3 solely to the facts alleged in the FAC, and these “factual allegations must be enough to
4 raise a right to relief above the speculative level, on the assumption that all the allegations
5 in the complaint are true even if doubtful in fact.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.
6 544, 555 (2007) (citations and internal quotations omitted). All factual allegations are
7 taken as true and construed in the light most favorable to the nonmoving party, *Iolab Corp.*
8 *v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir.1994), and all reasonable inferences are
9 to be drawn in favor of that party as well, *Jacobsen v. Hughes Aircraft*, 105 F.3d 1288,
10 1296 (9th Cir.1997). Dismissal is appropriate if the facts alleged do not state a claim that
11 is “‘plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
12 550 U.S. at 570).

13 Plausibility is not attained if the facts are merely consistent with his claims.
14 *Twombly*, 550 U.S. at 545, 557. “Where a complaint pleads facts that are ‘merely consistent
15 with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility
16 of entitlement to relief.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). The
17 factual allegations in the Complaint only need to plausibly suggest an entitlement to relief.
18 *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011). Plausibility is not probability, but
19 it is more than a mere possibility. The question at the pleading stage is whether Plaintiff
20 alleges enough facts to raise a reasonable expectation that discovery will reveal evidence
21 to support the allegations. *Id.*

22 On a Rule 12(b)(6) motion to dismiss, the Court does not resolve factual disputes
23 between parties on an undeveloped record, but instead determines whether the pleading
24 states a sufficient claim to warrant allowing the Plaintiff to attempt to prove his case. *Lee*,
25 250 F.3d at 688. This is a high standard and makes Rule 12(b)(6) motions disfavored.
26 *Durning v. First Boston Corp.*, 815 F.2d 1265, 1269 (9th Cir. 1987); *Williams v. Gorton*,
27 529 F.2d 668, 672 (9th Cir. 1976).

1 In response to the Motion to Dismiss, the Plaintiff argues the FAC states justiciable
2 claims. Alternatively, the Plaintiff seeks leave to file a Second Amended Complaint if the
3 Court finds the FAC lacks supporting facts. The Court will freely grant leave to amend
4 when justice so requires. Fed. R. Civ. P. 15(a)(2).

5 Motion to Dismiss

6 The Defendants argue that the retaliation claim should be dismissed because the
7 Plaintiff's allegation that he was demoted in retaliation for his disclosures fails to state a
8 claim under Arizona law, A.R.S. § 23-1501, which only protects against retaliatory
9 termination, and Plaintiff failed to allege compliance with A.R.S. 23-1502(B), requiring
10 notice be given to Westmed regarding the working conditions that prompted his
11 constructive discharge. The breach of contract claim fails because Plaintiff fails to allege
12 the existence of a valid, enforceable contract; he has not proffered a copy of the
13 employment agreement, and under Arizona law, employers like Westmed can make
14 unilateral changes to compensation programs. Finally, Defendants assert that the
15 negligent and fraudulent claims fail for lack of specificity as to when, where, and what
16 was said by McKinnon.

17 First, the Kansas state law claims are dismissed. The Court considers the merits of
18 the Motion to Dismiss under Arizona law.

19 In 1996, the Arizona Employment Protection Act (AEPA), A.R.S. § 23– 1501,
20 codified Arizona's public policy regarding employment relationships. *Cronin v. Sheldon*,
21 991 P.2d 231, 240–41 (Ariz. 1999); *White v. AKDHC, LLC*, 664 F.Supp.2d 1054, 1061
22 (Ariz. 2009). The AEPA exclusively governs employee breach of contract claims
23 resulting from termination. *White*, 664 F.Supp.2d at 1061. The AEPA displaces the
24 common law and “codifies the at will [employment] presumption and specifies very few
25 situations in which the presumption may be rebutted.” *Id.*

26 The employment relationship is severable at the pleasure of either the employee or
27 the employer unless both the employee and the employer have signed a written contract
28 to the contrary setting forth that the employment relationship shall remain in effect for a

1 specified duration of time or otherwise expressly restricting the right of either party to
 2 terminate the employment relationship. Both the employee and the employer must sign
 3 this written contract, or this written contract must be set forth in the employment
 4 handbook or manual or any similar document distributed to the employee, if that
 5 document expressly states the intent that it is a contract of employment, or this written
 6 contract must be set forth in a writing signed by the party to be charged. A.R.S. § 23–
 7 1501(A)(2). In the AEPA, “[t]he word ‘expressly’ means in direct or unmistakable terms;
 8 ... directly and distinctly stated; expressed, not merely implied or left to inference.”
 9 *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 2 P.3d 687, 691 (Ariz.App.2000).

10 The Defendants correctly point out that the Plaintiff fails to allege the existence of
 11 any express written contract signed by both parties as contemplated by the AEPA that
 12 would alter the presumptive employment at will relationship. He has alleged only an at
 13 will employment relationship, which may be terminated at any time for good cause or no
 14 cause. As the Plaintiff, himself, notes the only exception is firing an at will employee for
 15 “bad cause—one against public policy . . .” (Response (Doc. 29) (citing *Mack v.*
 16 *McDonnell Douglas Helicopter Co.*, 880 P.2d 1173, 1175 (Ariz. App. 1994) (preAEPA
 17 case citing *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025, 1036 (Ariz.
 18 1985)).

19 The AEPA provides that it is “[t]he public policy of this state [] that . . . [a]n
 20 employee has a claim against an employer for termination of employment only if one or
 21 more of the following circumstances have occurred,” A.R.S. § 23-1501(A)(3), including
 22 “[t]he employer has terminated the employment relationship of an employee in retaliation
 23 for any of the following: . . (ii) The disclosure by the employee in a reasonable manner that
 24 the employee has information or a reasonable belief that the employer, or an employee of
 25 the employer, has violated, is violating or will violate the Constitution of Arizona or the
 26 statutes of this state to either the employer or a representative of the employer who the
 27 employee reasonably believes is in a managerial or supervisory position and has the
 28 authority to investigate the information provided by the employee and to take action to

1 prevent further violations of the Constitution of Arizona or statutes of this state or an
 2 employee of a public body or political subdivision of this state or any agency of a public
 3 body or political subdivision.” A.R.S. § 23-1501(A)(3)(c). *See also Torrez v. City of*
 4 *Scottsdale*, 1997 WL 580326 (Ariz. Superior Ct. July 15, 1997) (relying on *Wagenseller*,
 5 public policies expressed in federal statutes or municipal ordinances do not support a state
 6 wrongful discharge claim); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468
 7 (9th Cir. 1984) (same)).

8 The Plaintiff alleges that he reported to the Westmed Board of Directors that the
 9 company was allegedly violating Food and Drug Administration (FDA) rules and
 10 regulation and state and federal employment laws. The alleged federal rules, regulations,
 11 and law violations will not support the AEPA claim. The Plaintiff fails to allege the state
 12 employment law he allegedly reported, and that this law “strikes at the heart of the citizen’s
 13 social rights, duties and responsibilities.” *See Murcott v. Best W. Int’l, Inc.*, 198 Ariz. 349,
 14 357, 9 P.3d 1088, 1096 (Ct. App. 2000), as amended (Oct. 16, 2000) (relying on guidance
 15 in *Wagenseller* about public policy protection for whistle-blowers from wrongful
 16 discharge). The Court assumes that the Westmed Board were persons who could take
 17 corrective action. *Id.* at 1097 (citing *Faust v. Ryder Commercial Leasing & Servs.*, 954
 18 S.W.2d 383 (Mo.App.1997) (plaintiff did not “blow the whistle” by speaking only to the
 19 wrongdoer himself).

20 Under Arizona law, constructive discharge is a redressable termination under the
 21 AEPA because “Arizona law allows an employee to claim constructive discharge based
 22 on an employer's “outrageous conduct” or failure to remedy “objectively difficult or
 23 unpleasant working conditions” that would compel a reasonable employee to resign.
 24 A.R.S. § 23–1502(A) (2018).” *Peterson v. City of Surprise*, 418 P.3d 1020, 1023 (Ariz.
 25 App. 2018). “[A]lthough constructive discharge may transform a resignation into a
 26 discharge, by itself, it does not afford an employee a remedy. *Id.* (citing A.R.S. § 23-
 27 1502(A) (stating elements of constructive-discharge claim that may be alleged “[i]n any
 28 action under the statutes of this state or under common law”) (emphasis added in

1 original). To prevail on a claim for constructive discharge, an employee must also prove a
2 common-law or statutory claim for wrongful termination, *Id.*

3 In short, “[t]he [A]EPA limits the potential claims of an employee who has been
4 terminated, whether directly or through constructive discharge,” and “allows a former
5 employee to sue for a discharge that violates a state statute or that is in retaliation for
6 reporting a violation of the Arizona Constitution or a state statute.” *Id.* (citing A.R.S. §
7 23–1501(A)(3)(b), (c)). As noted above, the FAC alleges the Plaintiff reported a state
8 employment law violation, but fails to identify it or allege that it is the type of law which
9 “strikes at the heart of the citizen’s social rights, duties and responsibilities.” There is no
10 independent cause of action under A.R.S. § 23-1502; the constructive discharge claim
11 brought fails if the AEPA wrongful termination claim fails. *Peterson*, 418 F.3d. at 1023.

12 The Plaintiff’s breach of contract claim alleges that McKinnon unilaterally
13 changed the annual compensation plan, which resulted in changed sales territories,
14 changed the number of sales managers by Westmed, and manipulated accounts in order
15 to avoid paying Plaintiff and others the compensation to which they were entitled to
16 under the terms of their contracts. As already noted, the FAC fails to allege facts to
17 support that the annual compensation plan, the Domestic Sales Compensation Program,
18 was an employment agreement as defined by the AEPA.

19 Under Arizona law, there is no “general” tort claim based on bad faith in
20 employment termination cases. *Nelson v. Phoenix Resort Corp.*, 888 P.2d 1375, 1384
21 (1995). However, in *Wagenseller*, the court recognized a good faith and fair dealing
22 exception to the general at will doctrine of employment. *Wagenseller*, 710 P.2d at 1031–
23 41. “In the case of an employment-at-will contract, it may be said that the parties have
24 agreed, for example, that the employee will do the work required by the employer and
25 that the employer will provide the necessary working conditions and pay the employee
26 for work done. What cannot be said is that one of the agreed benefits to the at-will
27 employee is a guarantee of continued employment or tenure. The very nature of the at-
28 will agreement precludes any claim for prospective benefit.” *Id.* at 1038.

Based on the Arizona Supreme Court's decision in *Wagenseller*, the Arizona legislature passed the AEPA, and the Arizona Supreme Court upheld the AEPA as constitutional, with the exception of the preamble, as the exclusive remedy for terminations that violate public policy statutes. *Fallar v. Compuware Corp.*, 202 F. Supp. 2d 1067, 1075–77 (D. Ariz. 2002) (citing *Cronin*, 991 P.2d at 236, 242). Importantly, the AEPA does not preclude recovery of compensatory damages under federal law . . . [,] nor does it preclude wrongfully terminated employees from pursuing collateral common law tort claims related to discharge from employment, including intentional infliction of emotional distress[,], negligent infliction of emotional distress [,] interference with contractual relations[,], or defamation ..., [and] a panoply of constitutionally protected common law tort remedies remains undisturbed as fully beyond the scope of the [A]EPA.” *Fallar*, 202 F. Supp. 2d at 1076 (citing *Cronin* at 241). *See e.g.*, *White*, 664 F.Supp.2d at 1065 (“a viable claim for breach of the implied covenant may lie if a plaintiff is alleging that conduct other than the termination itself breached the covenant.”)

For the reasons stated by the Defendants, the Court grants the motion to dismiss Counts I (Unlawful Retaliation: Demotion) and II (Breach of Contract), but notes that the allegations may support the AEPA retaliatory constructive discharge claim. The Response by the Plaintiff reflects that there may also be proximity in time evidence to support the retaliation claim. (Response (Doc. 29) at 3,10.) “[A] ‘mere coincidence of timing’ can rarely be sufficient to establish a submissible case of retaliatory discharge.” *Bejarano v. Roosevelt Elementary Sch. Dist.* No 66, 2011 WL 1375655, at *4 (Ariz. App. Apr. 12, 2011) (quoting *Kipp v. Mo. Highway & Transp. Comm’n*, 280 F.3d 893, 897 (8th Cir.2002) (quoting *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346–47 (8th Cir.1996)) (stating that “the interval of two months between the complaint and [the plaintiff’s] termination so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [the plaintiff’s] favor on the matter of causal link”)). *See e.g.*, *Czarny v. Hyatt Residential Mktg. Corp.*, No. 1 2018 WL 1190051, at *3–4 (Ariz. App. Mar. 8, 2018) (two days between

1 employee's reported violations and allegedly retaliatory act of calling for review of her
 2 sales performance raised material question of fact regarding retaliatory intent precluding
 3 summary judgment).

4 The Defendants challenge the fraud claims for lack of specificity under Fed. R.
 5 Civ. P 9(b) for failure to plead the claim with particularity. The Response suggests he
 6 may be able to comply with Rule 9(b). (Response (Doc. 29) at 14-15.) The Response
 7 asserts that the FAC "provides sufficient well-pleaded facts to establish claims for
 8 fraudulent misrepresentation, negligent misrepresentation, and promissory estoppel" but
 9 fails to cite to the record. As said by the Seventh Circuit in the now familiar maxim,
 10 "[j]udges are not like pigs, hunting for truffles buried in briefs." *Towers of Washington*
 11 *v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *United States v. Dunkel*, 927
 12 F.2d 955, 956 (7th Cir.1991)). Citation to the FAC would have made it evident to the
 13 Plaintiff that the fraud and negligent misrepresentation claims are asserted in conclusory
 14 fashion and do not include any of the specificity averred in the Response.

15 The Court dismisses the claims alleging negligent and fraudulent
 16 misrepresentations related to Defendants' alleged promise to give him stock options to
 17 induce him to leave his previous employment and begin working for Westmed. These
 18 alleged misrepresentations were made in 2016. An employee's claim for breach of an
 19 alleged oral or written employment contract must be brought within one year. A.R.S. §
 20 12-541(3); *See Fallar*, 202 F. Supp. 2d at 1075-77 (breach of employment contract
 21 barred by one-year statute of limitations); (*Lytikainen v. Schaffer's Bridal LLC*, 409
 22 F.Supp.3d 767, 775-776 (Ariz. 2019) (bifurcating allegations and dismissing as time
 23 barred those related to employment agreement and not those related to purchasing an

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1 interest in the bridal company); *Day v. LSI Corporation*, 174 F.Supp.3d 1130, 1155
2 (Ariz. 2016) (applying one-year statute of limitation to alleged promise to promote Day
3 once hired to vice president as an inducement to get him to accept position with LSI).

4 **Accordingly,**

5 **IT IS ORDERED** that the Motion to Dismiss (Doc. 28) is GRANTED, with leave
6 to amend.

7 **IT IS FURTHER ORDERED** that the Second Amended Complaint may be filed
8 within 21 days of the filing date of this Order.

9 Dated this 1st day of March, 2021.

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Honorable David C. Bury
United States District Judge